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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-64

MARIE ABATE, *et al.*,

Petitioners,

v.

PITTSBURGH PLATE GLASS COMPANY, *et al.*,

Respondents.

BRIEF OF PITTSBURGH PLATE GLASS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit correctly held that the District Court did not abuse its discretion in approving the settlement of this class action?

STATEMENT OF THE CASE

Petitioners are members of a Plaintiff class who seek review of the Court of Appeals' affirmance of the District Court's approval of the settlement of this class action.

This class action was filed August 4, 1970, pursuant to Title VII of the Civil Rights Act of 1964[1] (hereinafter "Title VII") on behalf of a class of females who were former em-

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[1] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e, *et seq.*

ployees of Defendant Pittsburgh Plate Glass Company ("PPG") and members of Defendants United Glass and Ceramic Workers of North America and its Local No. 12 (collectively the "Unions").[2]

Plaintiffs alleged that Defendants had violated Title VII by (1) improperly failing to recall them to work on jobs at PPG's Creighton, Pennsylvania, plant and (2) improperly agreeing to terminate the seniority rights of employees who had been in continuous layoff status from the Creighton plant for a period of five consecutive years.[3] For these alleged violations the Complaint sought damages[4] and injunctive relief.[5]

The parties agreed that Defendants' current seniority and job classification systems are not violative of the law.[6] Thus, future compliance with the Act has not been an issue in this case.

After a period of discovery, on July 15, 1971, the District Court ordered that the class was to include the 452 female employees whose employment had been terminated on September 26, 1968, pursuant to the seniority agreement applicable to the Creighton plant of PPG.[7]

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[2]Complaint (I App. 1). The abbreviation "App." refers to the Appendix (Volume I, II or III) prepared by Petitioners for their appeal to the United States Court of Appeals for the Third Circuit, C.A. Docket No. 73-1697.

[3]Complaint (I App. 1-7), Pl. Pre-Trial Narrative (I App. 32a-33).

[4]Complaint (I App. 6-7).

[5]*Id.*

[6]Stipulations of Fact 16, 23 and 24 (II App. 27, 39).

[7]District Court Order of July 15, 1971 (I App. 14).

On July 26, 1972, the District Court entered a supplemental Order determining that the action be maintained under Federal Rule of Civil Procedure 23(b)(3)[8], as well as under Rule 23(b)(2), and directing that a notice be sent to the 452 class members pursuant to Rule 23(c)(2).[9]

The Rule 23(c)(2) notice was approved by the District Court, mailed on July 31, 1972, and explicitly advised the class members of (a) the date, time, and place of the trial and their right to appear at the trial; (b) the nature of the action; (c) the Court's determination that they were a member of the class; (d) the relief sought; (e) the representation of the class by the law firm of Balzarini, Walsh, Conway & Maurizi; (f) their right to retain independent counsel to represent their own interests; and (g) that they would be included in and bound by any judgment entered in the case unless they filed a written request for exclusion from the class by August 20, 1972.[10]

The Court ultimately found that the class consisted of 371 members.[11] No class member exercised her option to be represented by separate counsel.

The parties engaged in extensive pre-trial discovery, including interrogatories, depositions and requests for admissions.[12]

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[8]Federal Rule of Civil Procedure 23 is herein referred to as Rule 23.

[9]District Court Order of July 26, 1972 (I App. 15).

[10]I App. 17. Because the parties subsequently located 70 persons whose addresses were previously unknown and in order to assure that the notice actually reached the intended recipient, the parties on November 27, 1972, obtained permission from the District Court to remail a virtually identical notice to class members but this time by certified mail with a return receipt requested (I App. 46).

[11]District Court Finding of Fact (I App. 57).

[12]District Court Docket Entries (I App. i-v).

Trial began in October, 1972. Plaintiffs completed their case in chief. Defendant PPG obtained a delay in the presentation of the defense until one of its primary expert witnesses had sufficiently recovered from a sudden serious illness to testify. On December 21, 1972, PPG began the presentation of its defense. During the second day of PPG's defense, on December 22, 1972, counsel for the parties for the first time reached a tentative basis for settlement of the action. The trial was accordingly suspended so that the terms of settlement could be fully particularized.

Counsel for all parties reached final agreement as to the terms of settlement and all counsel recommended that settlement to the District Court on January 8, 1973.[13]

The settlement included a payment by PPG of more than $1,151,000. This payment included $931,724 to 370[14] members of the Plaintiff class, to be allocated among them on the basis of months worked for PPG; a guarantee of a pension to 76 class members who had accumulated at least 9 years 9 months of pension credits, and a payment of $17,500 to six active class members, to be divided among them on the basis of their respective activities and expenses incurred in forwarding the litigation. PPG also agreed to pay out-of-pocket expenses of $1,350 and counsel fees of $201,250 to the various lawyers who represented the class, out of which counsel are to reimburse any class member any amount advanced to meet legal expenses.[15]

On January 8, 1973, when counsel for all parties presented the settlement to the District Court, the Court set

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[13]II App. 168.

[14]One class member had died prior to the settlement.

[15]District Court Opinion and Order of June 12, 1973 (I App. 57).

January 29, 1973, as the date for a hearing on the fairness of the settlement and directed that a specified form of notice setting forth the terms of the settlement be sent to all class members.[16]

The notice fully described the precise amounts and benefits to be received by each class member and informed them that if the settlement were approved it would be binding upon all members of the Plaintiff class.[17] The notice also instructed any class members who wished to assert objections to the settlement to mail or deliver any such objections to the Clerk of Court and to appear at the hearing on January 29, 1973, to voice their objections.[18] Class members were informed that if they approved of the settlement they need not appear at the January 29 hearing.[19]

Some class members appeared at the January 29 hearing to state objections.

Counsel for the objectors (now the Petitioners) subsequently filed a brief with the District Court in support of the objections to the settlement. In that brief counsel stated that: "Objectors present but one question for this Court's consideration: Is the settlement proposed here fair and reasonable?"[20]

The Equal Employment Opportunity Commission (hereinafter the "EEOC") filed a brief *amicus curiae* with the District Court, which argued that each class member has a

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[16] I App. 49; District Court Order of January 8, 1973 (I App. 52-53).

[17] Notice of Proposed Settlement of Class Action (I App. 54-55).

[18] *Id.*

[19] *Id.*

[20] Objecting Class Members' Brief in Opposition to Proposed Settlement at 3. The same counsel who represented the objectors have remained as their counsel and filed the instant Petition.

right to continue his or her action, by opting out of the class, after a settlement has been consummated.[21]

On June 12, 1973, the District Court entered an Opinion and Order approving the settlement.[22]

In response to the appeal filed by the objecting class members, the Court of Appeals affirmed the District Court's exercise of discretion in approving the settlement as a fair and reasonable compromise and agreed that there was no basis for establishing subclasses or for allowing the objecting class members to "opt out" of the settlement.[23]

On August 3, 1974, the instant Petition was received by PPG. On August 10, 1974, in response to PPG's Application for Extension of Time in Which to File Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit, the Clerk of this Court extended the time within which this Brief must be filed to and including September 17, 1974.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that where the terms of a settlement have been correctly determined to be fair and adequate, it is proper for a court approved settlement in a Rule 23(b) (3) action to bind all class members

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[21] Memorandum by the Equal Employment Opportunity Commission on the Right to Opt Out of a Proposed Settlement. Counsel for the objecting class members then filed what was labeled a Reply Brief of Objecting Class Members but which included an adoption of the EEOC's position that any individual class member can continue his or her own action by refusing to settle.

[22] 1 App. 57.

[23] *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir. 1974) which is also reprinted at 1a of the Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit (hereinafter the "Petition").

who have not previously excluded themselves from the class. Long in advance of the settlement of this action, the District Court had, in full compliance with Rule 23(c) (1), determined that the appropriate requisites of Rule 23(a) and (b) existed. Accordingly, the Court directed that Rule 23(c) (2) notices be sent advising class members of the fact that a Rule 23(b) (3) action had been determined to exist and of their right to request exclusion from the class. None of the Petitioners excluded themselves. It was only when Petitioners objected to settlement that they asserted any differences or disagreements with the rest of the class.

Rule 23(c) (2) provides that the judgment entered in a Rule 23(b) (3) action should include all members who had not excluded themselves pursuant to the Rule 23(c) (2) notice. The present Rule 23 was designed to avoid abuses which existed under the former rule, *i.e.*, that members of the potential class might await developments before being committed to class member status. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547-49 (1974). Accordingly, under the present Rule 23, potential class members retain the option to participate in or withdraw from the class action only until their election pursuant to the Rule 23(c) (2) notice. *American Pipe & Construction Co., supra* at 549.

Sound policy considerations, as well as the language of Rule 23, militate against the alteration in Rule 23 proposed by Petitioners. If the concepts proposed by Petitioners were accepted many class actions would become impossible to settle because the defendant would not have the incentive of avoiding the expense and inconvenience of a long trial, which often is a weighty factor inducing settlement. Inevitably, some litigious class members will desire to continue the action to adjudication. Equally important, Rule 23 will be-

come unmanageable from the standpoint of efficient judicial administration since after a long period of action in concert, classes would tend to splinter into a myriad of smaller subclasses and individual claims.

Contrary to the assertion in the Petition at 21, the Seventh Circuit Court of Appeals' decision in *Air Line Stewards and Stewardesses Assn., Local 550 v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, ___ U.S. ___, 40 L. Ed.2d 773 (1974) does not conflict with the opinion of the Third Circuit Court of Appeals in the instant case. In the instant case, the District Court made an appropriate class determination pursuant to a consideration of the requisites in Rule 23(a) and (b). In the instant case, the District Court had provided class members with an opportunity to "opt out" of the class, as Rule 23(c)(2) requires in a Rule 23(b)(3) action. In the instant case there were no differences in the characteristics of, or the causes of action asserted by, class members. In all of the above respects, the instant action differs from the *Stewards* decision.

Petitioners' argument, that the Court of Appeals should be reversed because the settlement is not sufficiently substantial, lacks any foundation. The settlement included a total payment of more than $1,151,000 by PPG covering payments to 370 class members, counsel fees and expenses. In evaluating the basis of the District Court's determination that the settlement was a fair and adequate compromise, the Court of Appeals correctly recognized that the District Court must not turn the settlement hearing into a trial or rehearsal of trial, because the very purpose of compromise is to avoid the trial and resolution of disputed issues. The Court of Appeals correctly noted that Petitioners had failed to substantiate their claims of a large potential monetary recovery even if no defenses to liability were found to exist.

The Court of Appeals also correctly determined that partial and total defenses to liability might exist in the instant case. For example, many, if not all, of the claims for alleged lost wages might be barred by the appropriate statute of limitations. In addition, since the job classification system and seniority cut-off agreement were established through a conciliation agreement with the EEOC, which recognized that the classification system was pursuant to bona fide occupational qualifications, the District Court might properly have determined, if trial had been completed, that no back-pay be awarded. Further, the seniority cut-off agreement has been applied to both men and women and was prompted by a legitimate business need to eliminate massive layoff lists of persons who had not been employed for great numbers of years.

The Court of Appeals, after reviewing all of these factors, correctly determined that the District Court had not abused its discretion in approving the terms of the settlement. Further, whether or not the District Court abused its discretion obviously turns upon the particular facts of this case. This Court's reconsideration of that question will affect few others than the instant litigants. PPG submits that this question is not appropriate for the grant of a writ of certiorari.

ARGUMENT

A. It Is Proper For A Fair And Adequate Settlement, Approved By The Court, To Bind All Class Members Who Have Not Previously Excluded Themselves From The Class In A Rule 23(b)(3) Action.

Petitioners seek to persuade this Court to depart from the well-settled rule, which has been universally applied, that Rule 23 permits the settlement of class actions to bind all

class members who have elected to participate in the action rather than to "opt-out" of the class pursuant to the Rule 23(c) (2) notice.

Petitioners suggestion (Petition at 18) that the District Court failed to comply with Rule 23, in approving the settlement of claims of all class members, is not well founded.

In this case the District Court fully complied with all procedures specified in Rule 23.

After a period of initial discovery the District Court held that this was a proper class action.[24] In so holding the Court found pursuant to Rule 23(a) that the class was so numerous as to make joinder impractical; that there were questions of law and fact common to the class; that the claims of the three named Plaintiffs who were the representative parties, were typical of the claims of the class as a whole; and that the representative parties would fairly and adequately protect the interests of the class.[25]

The District Court held that this was a proper action under Rule 23(b) (2) because PPG's actions were generally applicable to the whole class.[26] The Court also subsequently determined that the action had additional characteristics which made it maintainable under Rule 23(b) (3), as well.[27]

Accordingly, the Court directed that Rule 23(c) (2) notices be mailed to class members.[28] It is especially important that these notices explicitly stated, *inter alia*, that, unless class members exercised their election to request exclusion from the class within 20 days from the date of the notice,

[24]District Court Order of July 15, 1971 (I App. 14.).

[25]*Id.*

[26]*Id.*

[27]District Court Order of July 26, 1972 (I App. 15).

[28]The content of the notices is fully discussed *supra* at 3.

they would be included in the class and bound by any judgment entered in the case.[29]

Five months later, after extensive discovery proceedings and several days of trial, a basis of settlement was reached among counsel for all parties and proposed to the Court.[30] Pursuant to Rule 23(e) the Court directed a complete notice of the terms of the proposed settlement to the class members.[31]

The Court assured that any objectors who wished to testify were given a full opportunity to be heard on any and all objections they had to the settlement and that counsel for objectors would have adequate time to file briefs.[32]

On June 12, 1973, pursuant to Rule 23(e) the Court approved the settlement.[33]

Petitioners argue (Petition at 18) that the District Court erred in entering a judgment which disposed of their claims. Petitioners contend that, regardless of whether the settlement was fair, each individual class member has the right to continue her own action if she does not like the amount and terms of the settlement.

The concept proposed by Petitioners is inconsistent with the purposes of Rule 23. The findings of numerosity of class members, common questions of law and fact, typicality of the claims of the class representatives, and the adequacy of the class representatives, which are required by Rule 23 and

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[29]*Id.*

[30]The facts relating to the settlement negotiations and terms are discussed *supra* at 4.

[31]The facts relating to the settlement notice are fully discussed *supra* at 5.

[32]See discussion *supra* at 5.

[33]District Court Order of June 12, 1973 (I App. 57).

which were made in the instant case, clearly contemplate common treatment of class members.

The proper recourse of an objector to a class action settlement is appeal of the settlement in its entirety and not the "opting-out" of the settlement by individual class members. Rule 23(c)(2) states:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that: (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Rule 23(c)(3) states:

> "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

The Judgment in the instant case properly included all those who had not excluded themselves at the time of the class election that was made in response to the notice that had been sent pursuant to Rule 23(c)(2).

In this regard Professor Charles Wright has written:

> "Critical to the entire operation of the revised rule is the effect of the judgment. It is clearly contemplated

that every judgment in every class action will bind all of the members of the class, except for those who have asked to be excluded in a (b)(3) action."[34]

This Court recently explained the proper operation of Rule 23 in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974):

> "A recurrent source of *abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial* or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation – the potential for so-called 'one-way intervention' – aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to *assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.*
>
> Under the present Rule, a determination whether an action shall be maintained as a class action is made by the court '[a]s soon as practicable after the commencement of an action brought as a class action. . .' Rule 23 (c)(1). Once it is determined that the action may be maintained as a class action under subdivision (b)(3), the court is mandated to direct to members of the class 'the best notice practicable under the circumstances' advising them that they may be excluded from the class if they so request, that they will be bound by the judgment, whether favorable or not if they do not

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[34] Wright, "Class Actions," 47 F.R.D. 169, 181 (1969).

> request exclusion, and that a member who does not request exclusion may enter an appearance in the case. Rule 23 (c) (2). Finally, the present Rule provides that in Rule 23 (b) (3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion. Rule 23 (c) (3). *Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation 'as soon as practicable after the commencement' of the action when the suit is allowed to continue as a class action* and they are sent notice of their inclusion within the confines of the class. Thereafter they are either non-parties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse." (Footnotes Omitted; Emphasis Supplied) 414 U.S. at 547-49.

The Petitioners were given the opportunity to exclude themselves from the class when they received the notice required by Rule 23(c) (2). As noted in *American Pipe & Construction Co. v. Utah, supra*, having elected to participate, Petitioners are full members of the class who must be bound by a fair and reasonable settlement approved by the District Court. Despite Petitioners' assertions, this Court's opinion in *Protective Committee for Independent Stockholders of TMT Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968) is not to the contrary.[35]

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[35]Petition at 19-20 suggests that *Protective Committee v. Anderson, supra*, prohibits a court from settling individual claims of class members. Petitioners' citation to *Protective Committee v. Anderson* is inapposite. That case involved court approval of a corporate reorganization under the Bankruptcy Act. The district court had approved a plan of reorganization upon the recommendation of Anderson who was the trustee but who was also to be the president of the newly reorganized company. The reorganization recommended by Anderson included the nearly full satisfaction of certain mortgage holders–men who had been in a "controlling" relationship to the corporation–at the expense of the shareholders, despite the fact that Anderson had filed an earlier report stating his opinion

(continued)

Sound policy considerations, as well as the language of Rule 23, also militate against the alteration in Rule 23 proposed by the Petitioners.

A procedure which allows exclusion at this stage would reduce settlement possibilities in class actions. To permit class members a second opportunity to "opt-out" of the class, after a settlement has been concluded, in nearly every case would remove one of the most significant incentives for defendants to make a settlement–the avoidance of the costs of protracted litigation. These litigation costs–including counsel fees, expert witness fees and lost time of employees who assist in the case–are often an overwhelming incentive to settlement, particularly in a class action. Indeed, the procedure suggested by Petitioners would encourage class members to "opt-out" of the settlement in hope of extracting a tribute or premium from the party opposing the class.

Further, the concept proposed by the Petitioners could vastly multiply the number of class actions which the federal courts would be required to handle. One class action, such as the present case, might splinter into a number of subclasses.

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that the mortgage was a fraudulent conveyance and also that the mortgage holders had otherwise diverted corporate opportunities. Neither the district court nor Anderson explained his reversal of field on the validity of the mortgage or why the claims of the mortgage holders should be recognized. *Protective Committee v. Anderson, supra* at 426-27, 433-34. It was in that context that this Court determined that the district court's approval of the plan of reorganization was not adequately explained. In contrast, in the instant appeal there is no suggestion of fraud or collusion. The District Court's Opinion and Order in the instant case indicates that significant and legitimate legal defenses exist regarding whether any liability existed and that accordingly a compromise between Plaintiffs and Defendants was proper (I App. 57). The Court of Appeals in the instant case properly determined that the District Court had not violated the holdings in *Protective Committee v. Anderson, Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 804.

It is conceivable, with the publicity that attends a large monetary settlement offer, that numerous attorneys representing groups or individual class members would appear and the action may be effectively converted into the trial of many separate cases or, alternatively, settlement negotiations with various attorneys regarding many separate cases. Further, Petitioners' concept is not limited to a one time splintering of the class. If the Petitioners' concept were accepted, the instant case might splinter into one additional class with 80 class members at the present time but later splinter into any number of other subclasses should the bulk, but not all, of this first splintering class decide at some subsequent date to settle.

Finally, there is no conflict in the Circuits. The Petitioners have cited, and PPG has found, no case which has accepted the unique principle urged upon this Court.[36] The numerous appellate decisions, cited *infra* at 20, setting forth the standards for appellate review of settlements approved by lower courts, demonstrate that appeal is the proper recourse of dissenting class members.

The Petition at 21 states that *Air Line Stewards and Stewardesses Assn., Local 550 v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, ____U.S. ____, 40 L.Ed.2d 773 (1974) conflicts with the Opinion of the Court of Appeals for the Third Circuit in this case. An examination of the facts of the *Stewards* case shows that the decisions are not in conflict.

[36]The citations in Petition at 20 to the case of *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) and Petition at 21 to *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969) are inapplicable. Neither of those cases in any way involved a class action settlement. Further, the citation in Petition at 21 to *Eisen v. Carlisle & Jacquelin*, ___U.S. ___, 42 U.S.L.W. 4804 (May 28, 1974) is inapposite. PPG can find nothing in *Eisen* which countermands any of the procedures followed by the District Court in the instant case.

In *Stewards* the Court of Appeals for the Seventh Circuit disapproved a settlement of a Rule 23(b)(3) action where members of the plaintiff class had *never* received an "opt-out" opportunity pursuant to a Rule 23(c)(2) notice, and where the settlement had been negotiated by an attorney and the representative plaintiff union who were acting in a clear conflict of interest situation.

In *Stewards* the district court had made no determination as to whether a proper class action existed until after the settlement had been proposed. Even when that determination was made the *Stewards* district court did not address the prerequisites of Rule 23(a) or of any additional requirements in Rule 23(b).[37] The district court in that case incorrectly ignored the Rule 23(b)(3) character of the case and did not provide notice pursuant to Rule 23(c)(2). Therefore, as the Seventh Circuit noted, although the Rule 23(b)(3) character of the action was obvious, no member of that plaintiff class had been given an opportunity to "opt-out" as required by Rule 23(c)(2).[38]

Further, in *Stewards* counsel for the plaintiff union purported to act as counsel for the plaintiff class. He conducted the litigation and negotiated the settlement without consulting any member of the class concerning the terms of the settlement.[39] Counsel for plaintiff class admitted that the plaintiff union had made the decision to agree to the settlement.[40] Counsel for plaintiff class also admitted that both he and the union were attempting to act for two distinct groups of class members with conflicting and adverse interests.[41] One group consisted of stewardesses who were

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[37] *Stewards*, 490 F.2d 636, at 638.

[38] *Id.* at 643.

[39] *Id.* at 638.

[40] *Id.* at 640.

[41] *Id.*

then currently employed and whose principal interest was obtaining a change in the airlines' policy of terminating stewardesses who became pregnant. The other group consisted of former stewardesses whose claims included back pay, reinstatement, accumulated seniority and a change in the pregnancy policy. The Seventh Circuit noted the conflict between the interests of these two groups.[42] The Court required that a representative of the class of former stewardesses be permitted to replace the union as class representative and directed that a Rule 23(c)(2) notice be sent to all class members to provide an opportunity for each of them to exclude herself from the action or appear through her own counsel.[43] Citing *Hansberry v. Lee*, 311 U.S. 32 (1940), the Seventh Circuit noted that the persons in control of the union were the currently employed stewardesses, who were not even members of the class as it was redefined at the time of settlement.[44]

In distinction from *Stewards*, in the instant case the determination as to the maintenance of this action as a class action, its designation as a Rule 23(b)(3) class action, and the mailing of the required Rule 23(c)(2) notice giving all members of the class an opportunity to "opt-out" of the action occurred long before even a tentative basis of settlement existed. All provisions of Rule 23 were followed to the letter. All class members had been fully advised as to the nature of the action and the identity of the class representatives at the time of the Rule 23(c)(2) notice and class membership election. The Petitioners had rejected that opportunity to be excluded and rejected the opportunity to be represented by separate counsel.

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[42] *Id.* at 640.

[43] *Id.* at 643-644.

[44] *Id.* at 640.

Unlike *Stewards*, there is no distinction or conflict between the causes of action asserted by Petitioners and the causes of action asserted by the non-objecting members of the class. The logic of *Hamberry v. Lee*, supra, cited by the Seventh Circuit and by the instant Petition at 20, is not applicable to the instant facts. As the Court of Appeals correctly noted, "All class members are former PPG employees terminated at the same time for the same reason by the same action. No difference among the plaintiffs appeared until some objected to the settlement, and we cannot assume that objection to the settlement sprang from differences generic to one identifiable group of plaintiffs."[45] The Petitioners have pointed to no differences in the characteristics of the Petitioners compared to the non-objecting class members. Respondent is aware of no such differences. None appear as of record. The Petitioners had an average of 74.3 months service per person on the date of their termination; the class as a whole had an average of 77.1 months each.[46] In addition, class members in both the objecting and non-objecting categories had dates of hire ranging from 1943 to 1951 and dates of layoff ranging from 1951 to 1958.[47] Further, the District Court made findings regarding "common questions," the typicality of the claims of the plaintiffs, that the representative parties would fairly and adequately protect the interests of the class, and that the Company's actions were generally applicable to the class.[48]

In summary, unlike *Stewards* the requisites of Rule 23 were followed by the District Court; unlike *Stewards* all class

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[45] *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 804.

[46] These averages are compiled from data contained in Appendix A to Order of Court of June 12, 1973 (I App. 57).

[47] Def. PPG Ex. 8 (II App. 162-63).

[48] Order of July 15, 1971 (I App. 14).

members were given an opportunity to "opt-out" before settlement was reached; and unlike *Stewards* there were no conflicts between the claims of members of the class. Contrary to the assertions of the Petitioners there is no conflict between the decision in the *Stewards* case and the decision of the Court of Appeals below.

The Court of Appeals correctly determined that it was proper for the instant settlement to bind all members of the Plaintiff class.

B. There Is No Basis For Reversing The Court Of Appeals' Determination That The District Court's Approval Of The Settlement Was Not An Abuse Of Discretion.

The Petitioners suggest (Petition at 9) that the District Court erred in approving the settlement because the settlement was not sufficiently substantial. The standard of review applicable to this question is whether the District Court abused its discretion in approving the settlement. *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 454 (2d Cir. 1974); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647, 655 (7th Cir. 1971); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

Whether or not the District Court abused its discretion obviously turns upon the particular facts of this case. This Court's reconsideration of that question will affect few others than the instant litigants. PPG submits that this question is not appropriate for the grant of a writ of certiorari. In any event, the Court of Appeals in this case correctly determined that there was no abuse of discretion.

The settlement included a total payment of more than $1,151,000 by PPG covering payments to 370 class members, counsel fees and expenses.

At the time of approval of the settlement the District Court had available for its consideration substantial evidence as a result of extensive pre-trial discovery, pre-trial conferences, disposition of preliminary motions, oral arguments and written briefs, as well as exhibits and testimony introduced at trial. Plaintiffs' case in chief had been completed and Defendants' case had begun presentation when the suit was settled.

In evaluating the basis of the District Court's determination that the settlement was a fair and adequate compromise, the Court of Appeals correctly recognized that the District Court must not turn the settlement hearing into a trial or a rehearsal of trial, because the very purpose of a compromise is to avoid the trial and resolution of disputed issues. *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972).

This is an extremely complex case, the factual development of which extends over more than 40 years, and involves many difficult legal and factual issues. After reviewing the massive evidentary materials available and the arguments presented by all parties, the District Court concluded that this case involved many complex issues which made "liability questionable and subject to conjecture." [49]

The probability is substantial that, had the case been tried to conclusion, PPG could have presented a complete defense to liability or, had a violation been found to have existed, that a monetary award to Plaintiffs would have been found unwarranted or very limited in amount.

For example, the evidence at trial proved that the seniority cutoff agreement, toward which Petitioners have directed much of their fire, was, when viewed from the per-

[49] *Bryen v. Pittsburgh Plate Glass Co.*, 59 F.R.D. 616, 617 (W.D. Pa. 1973), *aff'd*, 494 F.2d 799 (3d Cir. 1974).

spective of its total impact upon the work force, a completely non-discriminatory agreement which ultimately will probably adversely affect more men than women. [50]

Moreover, the seniority cutoff was entered into for sound business reasons [51] completely unrelated to the sex of the employees ultimately affected by it. The cases hold that an agreement will not be held to violate Title VII if it was entered into as a matter of business necessity. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006, 1007 (1972).

A substantial defense also exists that the Plaintiffs' claims are severely limited and perhaps barred by the applicable statute of limitations.

Petitioners claim that the Plaintiffs in the action should have been recalled from layoffs at periods since July 2, 1965 (the effective date of Title VII) and accordingly suffered the loss of wages from failure to recall.[52]

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[50] The testimony at trial and the agreement on its face clearly indicate that the agreement applies even-handedly to both men and women. [II App. 158 and Pl. Ex. 22 (II App. 6)]. Although the initial impact of the agreement affected only members of the Plaintiff class, the agreement was intended to, and has since resulted in, the termination of men who are laid off for more than five years. By December, 1972, the agreement had terminated the seniority of 24 men. Def. PPG's Answer to Pl. Interrogatory 1, App. A–Pl. Ex. 19a (II App. 14). As of August 7, 1974, 90 male employees had been terminated under the agreement.

[51] The decreasing level of employment at Creighton plant (from 4,200 in 1952 to 800 in 1972) had created a massive layoff list, which included both men and women, and which seriously interfered with the ability of the Creighton plant to operate competitively. (II App. 105, 111, 120, 122-23). The testimony at trial established that a seniority cutoff agreement was essential to Creighton plant because the massive layoff list effectively prevented the infusion of new workers into the plant (II App. 122-23).

[52] Petition at 10.

However, there is no evidence that a single vacancy existed, that a new employee was hired or that any employee was recalled from layoff subsequent to June of 1968. The first class member to file charges waited until late November 1968.[53] Title VII of the Civil Rights Act, as it applied at all times revelant to this suit, required an aggrieved person to file a charge with the EEOC within 90 days after an alleged unlawful employment practice occurred (42 U.S.C. § 2000 e-5(d)). The probability is high that all of Plaintiffs' claims, to the extent that they involve allegations of discriminatory failure to recall from layoff, are barred by the applicable period of limitations. Recent decisions have indicated that the appropriate class of Plaintiffs should not even include persons who were not injured by the alleged unlawful act within the statute of limitations period applicable to the filing of charges with the EEOC.[54] Accordingly, it was not error for the Third Circuit to indicate that the Plaintiffs in the instant case may have been barred from asserting the claims of discriminatory layoff and failure to recall upon which Petitioners base their allegations of large potential monetary recovery.[55]

In addition, even if the Plaintiffs were to prevail on the issues of liability, there is a strong possibility that the result-

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[53] Pl. Exs. 102-104 (II App. 46).

[54] In *Hecht v. Cooperative for American Relief Everywhere, Inc.*, 351 F. Supp. 305 (S.D. N.Y. 1972) the court used the applicable statute of limitations [there 210 days pursuant to the 1972 amendments] to exclude purported class members because their discharges occurred outside of the limitations period prior to the filing of the charge. *Gilbert v. General Electric Company*, 59 F.R.D. 267 (E.D. Va. 1973) held that the appropriate scope of the class was limited to females who were employed on or after a date measured 90 days prior to the earliest date of filing of charges with the EEOC by a class representative.

[55] *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 802.

ing award would not be as substantial as the benefits conferred by this settlement. The statute clearly leaves the award or denial of back pay to the discretion of the District Court, to be exercised in the light of the circumstances of each case. *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240, 248 (3d Cir. 1973).

In the instant case a refusal to grant backpay would be appropriate. Defendants maintained the Creighton plant job classifications and entered into the seniority cutoff in good faith compliance with the terms of an EEOC conciliation agreement.[56] To penalize such compliance by a back pay award, upon an *ex post facto* determination that the terms of the conciliation agreement were unlawful, would be unfair.[57] The Third Circuit correctly noted that upon the facts of this case, the District Court might properly have determined, if trial had been completed, that no backpay be awarded.[58]

Finally, the Petitioners urge that the settlement is unfair because it is not sufficiently substantial and does not include all forms of relief they feel they would receive if they were successful in a litigation to the finish.[59]

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[56]Def. PPG Ex. 7 at 4a (II App. 149-51) and Def. PPG Ex. 5 (II App. 132, 136).

[57]Numerous cases have refused to impose backpay liability upon defendants who acted in good faith in accordance with the terms of agreements with the Office of Federal Contract Compliance (the fair employment agency covering government contractors) or with EEOC guidelines on state protective legislation. *Kober v. Westinghouse Electric Corporation*, 480 F.2d 240, 248 (3d Cir. 1973); *Manning v. General Motors Corp.*, 466 F.2d 812 (6th Cir.1972), *cert. denied*, 410 U.S. 946 (1973); *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971); and *Stevenson v. International Paper Company*, 352 F.Supp 230 (S.D. Ala. 1972).

[58]*Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 802.

[59]Petition at 10.

Petitioners claim that the class members lost six years of pay but offer no evidence to support that claim.[60]

The only evidence cited by the Petitioners is the data in Petition at 10. There Petitioners note that 380 men were hired in the period since the effective date of Title VII. Two hundred ninety-four of those men were hired in 1966, 82 men were hired in 1967, and 4 men were hired in 1968.[61] It should be remembered that there were 452 women in the potential class as determined by the Order of July 15, 1971.[62] Therefore, even if none of the men had been hired and only the women on layoff had been employed to perform heavy laboring jobs, not all of them would have been offered work.[63] Moreover, virtually all of the newly hired men worked only for a brief period, usually one or two years.[64] Finally, the period when these men were hired and worked was outside of the applicable statute of limitations period.[65] The Third Circuit correctly noted that Plaintiffs have failed to substantiate their claims of large potential monetary recovery.[66]

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[60]*Id.* The Petitioners quote (Petition at 11-12) from certain trial testimony of one of the most senior class members who assumed without any supporting evidence that *she* had lost seven years back wages. That class member subsequently agreed to the settlement and is not one of the present objectors.

[61]Stipulations of Fact 37, 38 and 39 (II App. 101-3).

[62]I App. 14.

[63]Furthermore, the "labor" jobs into which the men were recalled involved both stamina and physical strength probably beyond that of women of the age of Plaintiff class in 1966-68. Even if the members of the Plaintiff class had been recalled, they would have had to demonstrate that they were physically capable of performing the jobs in question.

[64]Stipulations of Fact 37, 38 and 39 (IIApp. 101-03).

[65]See discussion *supra* at 22-23.

[66]*Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, at 802.

Of course any claims by the Petitioners that they would have received pension credits, if they had worked, bear the same defects as their claims for back wages. In addition, the claims for reinstatement are illusory because of the declining work force at Creighton.[67]

Further, the fact that a proposed settlement is less than the recovery which might result from a successful litigation does not mean that the proposed settlement should be disapproved.[68] This is particularly applicable in the context of the present case where the District Court has determined that there is substantial uncertainty as to whether liability could be established.

Appellate decisions reviewing class action settlements have reiterated several recurring principles applicable to the review of class action settlements: (1) compromise is favored as an efficient device for lessening the burden on the courts; (2) by its nature, a settlement represents a compromise between the parties and should not be expected to afford to class members every goal they might achieve through a complete victory after full litigation; and (3) the court is the guardian of non-objecting class members and should reject

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[67]The work force at Creighton in December, 1972 was 800 persons. (II App. 111). The prospects for a significant increase in employment are not good. (II App. 114). Even assuming that women the age of the Plaintiff class could perform all of the jobs in the plant, many of which are heavy and strenuous and are performed under very hot working conditions, the prospect of the re-employment of the 370 class members is not good.

[68]*City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974); *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971).

the contentions of objectors if the immediate benefits of the settlement outweigh the possible rewards of full litigation.[69]

In accordance with those principles, the Court of Appeals found that the District Court's approval of the settlement of this action was not an abuse of discretion.

This Court should not grant a writ of certiorari to undertake a second appellate review of the District Court's approval.

CONCLUSION

For all of the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[69] *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974); *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1971); *Mungin v. Florida East Coast Railway Co.*, 318 F.Supp. 720 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971), *cert. denied*, 404 U.S. 897 (1971).